



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO
GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Prishtina, 22 janar 2013
Ref. No.: RK350/13

RESOLUTION ON INADMISSIBILITY

in

Case No.

KI51/09, KI31/10, KI68/11, KI99/11, KI112/11, KI126/11 KI07/12, KI64/12,

Applicants

Vahide Hasani, Alltane Krasniqi, Shpresa Lladrovci, Fetije Berisha, Fahrije Ibrahim, Sadije Pranaj, Raza Gashi, Nazmije Salihu

Constitutional Review of 8 Individual Judgments of the Supreme Court of the Republic of Kosovo

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge
Arta Rama-Hajrizi, Judge

Introduction

1. This report concerns Referrals made by Applicants listed below which were lodged with the Constitutional Court by eight (8) **widows** of former employees of the Kosovo Energy Corporation (KEK) between 2009 and 2012.
2. The present cases are similar– to Case KI No. 40/09, “Imer Ibrahim and 48 other former employees of Kosovo Energy Corporation against 49 Individual Judgments of the Supreme Court of the Republic of Kosovo” and “Gani Prokshi and 15 other former employees of the Kosovo Energy Corporation against 16 Individual Judgments of the Supreme Court of the Republic of Kosovo, “Isuf Mërlaku and 25 other former employees of Kosovo Energy Corporation” and “Ilaz Halili and 20 other former employees of Kosovo Energy Corporation”.

Applicants in the present case are as follows:

3. In this Judgment for ease reference Applicants may be referred to collectively as “Vahide Hasani and others.”
 1. Vahide Hasani,
 2. Alltane Krasniqi,
 3. Shpresa Lladrovci
 4. Fetije Berisha,
 5. Sadije Pranaj,
 6. Fahrije Ibrahimimi,
 7. Raza Gashi
 8. Nazife Xhafolli,

Subject matter

4. The subject matter of this Referral is the assessment of the constitutionality of the individual Judgments delivered by the Supreme Court of the Republic of Kosovo eight (8) individual cases of Applicants against KEK as specified above.

Legal basis

5. The Referral is based on Article 113 of the Constitution of the Republic of Kosovo (hereinafter referred to as the Constitution), Article 20 of the Law No. 03/L-121 on the Constitutional Court of the Republic Kosovo (hereinafter referred to as: the Law) and Section 56 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter referred to as: the Rules of Procedure).

Summary of the facts as alleged by the Parties

6. The facts of these Referrals are similar to those in “the Case of Imer Ibrahimimi and 48 other former employees of the Kosovo Energy Corporation v. 49 individual Judgments of the Supreme Court of the Republic of Kosovo” and “the Case of Gani Prokshi and 15 other former employees of the Kosovo Energy Corporation v. 16 Individual Judgments of the Supreme Court of the Republic of Kosovo,” Isuf Mërlaku and 25 other former employees of Kosovo Energy Corporation” See the Judgments of Constitutional Court of Kosovo, (hereinafter referred to as “the case of Ibrahimimi and others” dated 23 June 2010, “the case of Prokshi and others” dated 18 October 2010 and “ the case of Merlaku and others” dated 10 March 2011).
7. In the course of 2001 and 2002, each of Applicants’ late husband in this Referral, as with Applicants in the said Judgments, signed an Agreement for Temporary Compensation of Salary for Termination of Employment Contract with their employer KEK. These Agreements were, in substance, the same.
8. Article 1 of the Agreements established that, pursuant to Article 18 of the Law on Pension and Invalidity Insurance in Kosovo (Official Gazette of the Social Autonomous Province of Kosovo No 26/83, 26/86 and 11/88) and at the conclusion of KEK Invalidity Commission, the beneficiary (i.e. each of the Applicant) is entitled a temporary compensation due to early termination of the employment contract until the establishment and functioning of the Kosovo Fund on Pension-Invalidity Insurance.
9. Article 2 of the Agreements specified that the amount to be paid monthly to each Applicant was to be 206 German Marks.

10. Article 3 specified that “payment shall end on the day that the Kosovo Pension-Invalidity Insurance Fund enters into operation. On that day onwards, the beneficiary may realize his/her rights in the Kosovo Pension and Invalidity Insurance Fund (the Kosovo Pension Invalidity Fund), and KEK shall be relieved from liabilities to the User as per this Agreement.”
11. On 1 November 2002, the Executive Board of KEK adopted a Decision on the Establishment of the Pension Fund, in line with the requirements of UNMIK Regulation No 2001/30 on Pensions in Kosovo. Article 3 of this Decision reads as follows: “The Pension Fund shall continue to exist in an undefined duration, pursuant to terms and liabilities as defined with Pension Laws, as adopted by Pension Fund Board and KEK, in line with this Decision, or until the legal conditions on the existence and functioning of the Fund are in line with Pension Regulations or Pension Rules adopted by BPK.”
12. On 25 July 2006, the KEK Executive Board annulled the above mentioned Decision on the Establishment of the Supplementary Pension Fund and terminated the funding and functioning of the Supplementary Pension Fund, with effect from 31 July 2006. According to the Decision of 25 July 2006, all beneficiaries were guaranteed full payment in line with the Fund Statute. Furthermore the total obligations towards beneficiaries were 2, 395,487 Euro, banking deposits were 3,677,383 Euro and asset surplus from liability were 1,281,896 Euro. The Decision stated that KEK employees that are acknowledged as labour disabled persons by the Ministry of Labour and Social Welfare shall enjoy rights provided by the Ministry. On 14 November 2006, KEK informed the Central Banking Authority that “decision on revocation of the KEK Pension Fund is based on decision of the KEK Executive Board and the Decision of the Pension Managing Board... due to the financial risk that the scheme poses to KEK in the future.”
13. According to Applicants’, KEK terminated the payment stipulated by the Agreements following the death of their spouses without any notification. Applicants claim that such an action is in contradiction to the Agreements signed by their husbands.
14. Applicants’ also claim that it is well known that the Kosovo Pension Invalidity Fund has not been established yet.
15. Applicants’ sued KEK before the Municipal Court in Prishtina, requesting the Court to order KEK to pay unpaid payments and to continue to pay 105 Euro (equivalent to 206 German Marks) until conditions are met for the termination of the payment.
16. The Municipal Court in Prishtina approved Applicants’ claims and ordered monetary compensation. The Municipal Court of Prishtina found (*e.g. the Judgment C. Nr. 2267/2006 of 20 April 2007 in the case of the first Applicant Vahide Hasani*) that the conditions provided by Article 3 of the Agreements have not been met. Article 3 of the Agreements provides for salary compensation until the establishment of the pension invalidity fund. “Which means an entitlement to a retirement scheme, would not have been possible for her husband if he were still alive, because he would have still not reached the age of 65 and that the applicant inherits the rights of her husband to continue to receive these payments”.
17. KEK appealed against the judgments of the Municipal Court to the District Court, arguing, *inter alia*, that the Municipal Court judgment was not fair because the Agreements were signed with Applicants because of the invalidity of Applicants and that they cannot claim continuation after the death of their husbands.

18. KEK reiterated that the Court was obliged to decide upon the UNMIK Regulation 2003/40 on the promulgation of the Law on Invalidity Pensions according to which Applicants were entitled to an invalidity pension.
19. The District Court in Prishtina rejected the appeals of KEK and found their submissions ungrounded.
20. KEK submitted a revision to the Supreme Court because of an alleged essential violation of the Law on Contested Procedure and erroneous application of material law. It repeated that Applicants were entitled to the pension provided by the 2003/40 Law and that because of humanitarian reasons it continued to pay monthly compensation for 60 months.
21. The Supreme Court accepted the revisions of KEK, and quashed the judgments of the District Court and the Municipal Court in Prishtina and rejected as unfounded Applicants claim.
22. The Supreme Court argued that the manner of termination of employment was considered lawful pursuant to Article 11.1 of UNMIK Regulation 2001/27 on the Basic Labour Law in Kosovo.
23. The Supreme Court rejected Applicants request stating that “the fact that the Pension-Invalidity fund is not functional does not affect Applicants case as the Agreement was signed between the Applicant’s late husband and thus according to Article 359 of the Law on Obligation Relationships (LMD), KEK has no further obligations.
24. The Supreme Court stated that KEK had no further obligation to Applicants. Furthermore, Applicants continued to get payments from KEK for 60 months according to the Statute which was entered into force in 2002.
25. Some of Applicants have requested from the Supreme Court to the reopen the procedures based on the letter of the Ministry of Social Welfare confirming that the Invalidity Pension fund is not functional to this date.
26. On 15 May 2009, Kosovo Ministry of Labour and Social Welfare issued the following note:

“The finding of the Supreme Court of Kosovo, in its reasoning of e.g. Judgment Rev. No. 338/2008, that in the Republic of Kosovo there is a Pension and Invalidity and Pension Insurance Fund which is functional since 1 January 2004 is not accurate and is ungrounded. In giving this statement, we consider the fact that UNMIK regulation 2003/40 promulgates the Law No 2003/213 on the pensions of disabled persons in Kosovo, which regulates over permanently disabled persons, who may enjoy this scheme in accordance with conditions and criteria as provided by this law. Hence let me underline that the provisions of this Law do not provide for the establishment of a Pension and Invalidity Insurance in the country. Establishment of the Pension and Invalidity Insurance Fund in the Republic of Kosovo is provided by provisions of the Law on pension and Invalidity Insurance funds, which is in the process of drafting and approval at the Government of Kosovo.” The same note clarified that at the time of writing that note, the pension *inter alia* existed “Invalidity pension in amount of 45 Euro regulated by the Law on Pensions of Invalidity Persons (beneficiaries of these are all persons with full and permanent Invalidity)” as well as “contribution defined pensions of 82 Euro that are regulated by Decision of the Government (the beneficiaries of these are all the pensioners that have reached the pensions age of 65 and who at least have 15 years of working experience)”.

27. The Supreme Court rejected Applicants request to reopen the procedure stating that the issue that the Kosovo Pension Invalidation Fund in not yet functional does not affect Applicants' case because the temporary agreement was signed by their late husbands.
28. The Supreme Court reiterated that "the right for Temporary Compensation cannot be transferred to other persons since it is a subjective right linked closely with the employer and employee"
29. The Supreme Court held that KEK fulfilled its obligations by continuing to pay Applicants' 105 Euros for 60 months.

Complaints

30. Applicants complain that their rights have been violated because KEK discontinues the payments following the death of their husbands who were the signatories of these agreements although the condition prescribed in article 3, the establishment of the Kosovo Pension-Invalidation Insurance Fund) had not been fulfilled.

Summary of the proceedings before the Court

31. Between 2009 and June 2012, Applicants individually, filed the Referrals to the Constitutional Court.
32. Between 2010 and 2012, the Constitutional Court informed the Supreme Court of Kosovo regarding Applicants' referrals.
33. On 17 February 2012, the President of the Court appointed Judge Kadri Kryeziu as Judge Rapporteur and appointed a Review Panel of the Court composed of Judges Altay Suroy (Presiding), Enver Hasani and Iliriana Islami.
34. On 15 October 2012, the President by Decision (No. KSH.KI-KEK/VI) appointed Judge Ivan Čukalović as member of the Review Panel after the term of office of Judge Iliriana Islami as Judge of the Court had ended.
35. On 17 October 2012 the Review Panel reviewed the report of the Judge Rapporteur and recommended to the full court the inadmissibility of the referrals.

Admissibility

36. In order to be able to adjudicate the Applicant's referral, the Court needs first to examine whether the Applicant has fulfilled all the admissibility requirements laid down in the Constitution.
37. The Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by ordinary courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see, *mutatis mutandis*, *García Ruiz v. Spain* [GC], no.30544/96, § 28, European Court on Human Rights [ECHR] 1999-I).
38. The Court recalls the admissibility criterion provided by article 34 of the Convention, according to which any application has to be lodged by an applicant who could claim to be the victim of a violation of the Convention. A link should also be established between the applicant and the damage that he or she suffered because of the alleged violation.

39. The Supreme Court in its operative part of the decision stated that “The right cannot be transferred to other persons since it is a subjective right linked closely with the employer and employee and that this issue relates to a temporary compensation for termination of employment and not legal pension and thus the fact that the Pension-Invalidity fund is not functional does not affect Applicants case as the Agreement was signed between Applicants’ husband (deceased) and thus according to Article 359 of the Law on Obligations, KEK has no further obligations”.
40. Furthermore, Article 51 of the Constitution [Health and Social Protection] which is referred to by some of the above mentioned Applicants relating to pensions, merely states that, ” Basic social insurance related to unemployment, disease, disability and old age shall be regulated by law.” It does not mandate that a citizen have a pension or dictate how a person may qualify for a pension.
41. With regards to the reasoning of the Constitutional Court in its previous Judgments related to former employees of KEK, the latter cannot be applied to the present Applicants’ for the reason that they are were not signatories of the agreement signed with KEK and as such is of non-transferable nature.
42. Furthermore, Applicants’ do not directly specify either any constitutional provision that could have been violated by the decision that they are challenging without being able to prove "the status of the victim of the public authority's act" as it is foreseen in article 34 of the EU Convention for Protection of Human Rights.
43. Having examined both administrative proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, *Shub v. Lithuania*, ECHR Decision as to the Admissibility of Application no.17064/06 of 30 June 2009).

FOR THESE REASONS

The Constitutional Court, pursuant to Article 114(7) of the Constitution, Article 20 of the Law on the Constitutional Court and Rule 36 of the Rules of Procedure, on 17 October 2012 unanimously

DECIDES

- I. To Join the Referrals;
- II. TO REJECT the Referrals as Inadmissible;
- III. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20(4) of the Law; and
- IV. This Decision is effective immediately.

Judge Rapporteur

Kadri Kryeziu



President of the Constitutional Court

Prof. Dr. Enver Hasani

